

APPEAL NO. 033304
FILED FEBRUARY 17, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on October 15 and November 24, 2003. The hearing officer determined that the decision of the Independent Review Organization (IRO) against approval of spinal surgery should not be upheld, and that the recommended spinal surgery should be approved. The appellant (carrier) appeals, contending that the determination of the IRO to deny spinal surgery is not against the preponderance of the medical evidence, and that the contrary medical evidence represents a mere difference of medical opinion. The file does not contain a response from the claimant.

DECISION

Affirmed.

The hearing officer did not err in concluding that the IRO's decision and order is not supported by a preponderance of the evidence. The claimant sustained a compensable injury to her head, cervical and lumbar spine, and right knee on _____. The claimant had multiple surgeries on her right knee. After extensive conservative treatment for her cervical spine failed, the claimant's orthopedic surgeon requested authorization to perform an anterior cervical discectomy with interbody fusion. The carrier disputed the surgeon's recommendation based upon a records review by Intracorp. The Texas Workers' Compensation Commission assigned this case to an IRO. The IRO agreed with the adverse determination of the carrier that the claimant had no need for cervical surgery. There is conflicting medical evidence in the record on this issue. According to Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 133.308(w) (Rule 133.308(w)), the IRO's determination is to be given presumptive weight. We have previously addressed the "presumptive weight" provision of Rule 133.308(w) and determined that it is an evidentiary rule which creates a rebuttable presumption, as distinguished from a conclusive presumption, that the IRO decision is the correct decision which should be adopted by the hearing officer and the Appeals Panel unless rebutted by contrary evidence. See Texas Workers' Compensation Commission Appeal No. 021958-s, decided September 16, 2002. In the instant case, the hearing officer found that the opinion of the treating surgeon that the claimant needed cervical surgery was sufficient to overcome the presumptive weight afforded to the IRO. The hearing officer specifically stated that the suggested course of treatment recommended by the IRO had already been tried and had failed. Additionally, the hearing officer noted that the additional testing recommended by the IRO had already been performed and that they confirmed a defect in the claimant's cervical spine. The hearing officer concluded that "[f]actual errors in the IRO decision, as well as [claimant's treating surgeon's] testimony, militate in favor of a finding for [the] [c]laimant." The issue presented a question of fact for the hearing officer to resolve. The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the trier

of fact, the hearing officer resolves the conflicts and inconsistencies in the evidence and decides what facts the evidence has established. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). The factors emphasized by the carrier in challenging the hearing officer's determination on appeal are the same factors it emphasized at the hearing. The significance, if any, of those factors was a matter for the hearing officer in making his credibility determinations. The medical records support the hearing officer's determination. Nothing in our review of the record reveals that the challenged determination is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Accordingly, no sound basis exists for us to reverse that determination on appeal. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **PACIFIC EMPLOYERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**ROBIN MOUNTAIN
6600 EAST CAMPUS CIRCLE DRIVE, SUITE 300
IRVING, TEXAS 75063.**

Thomas A. Knapp
Appeals Judge

CONCUR:

Chris Cowan
Appeals Judge

Margaret L. Turner
Appeals Judge